

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 FREEMAN INVESTMENT
12 MANAGEMENT CO., LLC, a Delaware
13 Corporation,

14 Plaintiff,

15 v.

16 FRANK RUSSELL COMPANY, a
17 Washington Company, d/b/a RUSSELL
18 INVESTMENT GROUP,

Defendant.

Case No.: 13-CV-2856 JLS (RBB)

**ORDER: (1) DENYING
DEFENDANT'S MOTION TO
DISMISS,
(2) DENYING DEFENDANT'S
MOTION TO AMEND, AND
(3) SETTING HEARING**

(ECF Nos. 86, 133, 134, 154, 159, 160,
173, 188)

19 Presently before the Court are Defendant Frank Russell Company's 12(b)(1) Motion
20 to Dismiss for Lack of Jurisdiction (MTD, ECF No. 173¹) and Motion for Leave to Amend
21 Its Answer to Modify Its Affirmative Defenses (Mot. to Amend, ECF No. 86), as well as
22 Plaintiff Freeman Investment Management Co., LLC's Oppositions to (ECF Nos. 212 &
23 217, 97, respectively) and Defendant's Replies in Support of (ECF Nos. 235, 156,
24 respectively) Defendant's motions. Also pending before the Court are Plaintiff's Motion
25 for Summary Judgment Dismissing Affirmative Defenses of Unclean Hands, Waiver, and
26

27
28 ¹ Because Defendant's MTD is filed under seal (*see* ECF No. 182), the public redacted version of
Defendant's MTD can be found at ECF No. 188.

1 Estoppel (Pl.’s MSJ, ECF No. 133); Defendant’s Motion for Summary Judgment (Def.’s
 2 MSJ, ECF No. 134²); Plaintiff’s Motion to Exclude Testimony of Sumanth Addanki and
 3 Jeffrey Wurgler (Pl.’s *Daubert* Mot., ECF No. 154); Defendant’s *Daubert* Motion to
 4 Preclude Opinions of Charles Porten and Certain Opinions of Jeffrey Kinrich (Def.’s
 5 *Daubert* Mot., ECF No. 159); and Defendant’s Objection and Motion to Set Aside
 6 Magistrate Judge’s Order Granting in Part and Denying in Part Defendant’s CivLR
 7 16.1(f)(1)(B) Motion to Continue Final Pretrial Conference Currently Set for June 9, 2016
 8 (ECF No. 253), all of which are fully briefed.

9 The Court vacated the hearings on these matters, taking some of them under
 10 submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). (ECF Nos. 122,
 11 181, 226, 265.) Having considered the parties’ arguments and the law, the Court **DENIES**
 12 Defendant’s MTD (ECF No. 173), **DENIES** Defendant’s Motion to Amend (ECF No. 86),
 13 and **SETS A HEARING** on the parties’ MSJs (ECF Nos. 133, 134, 160) and *Daubert*
 14 Motions (ECF Nos. 154, 159) for August 18, 2016 at 1:30 p.m. in Courtroom 4A.

15 **BACKGROUND**

16 **I. Factual Background**

17 John Freeman, who has worked in the field of investment management and research
 18 for over twenty-five years, founded Plaintiff in 2008. (First Am. Compl. (FAC) ¶¶ 5–6,
 19 ECF No. 18.) When Mr. Freeman began his employment at Plaintiff, he received a copy
 20 of the Freeman Employee Handbook and agreed to its terms. (Decl. of John Freeman
 21 (Freeman Decl.) ¶ 19, ECF No. 212-2.) The 2009 Freeman Employee Handbook provided
 22 that “[a]ny and all inventions created, in whole or in part, during an employee’s work hours,
 23 or from the use of the company’s equipment or facilities, is a ‘work for hire’ and the
 24 property of the company.” (Freeman Decl. Ex. J at 68, ECF No. 212-4 at 26.³) Similarly,

26 ² Because Defendant’s MSJ is filed under seal (see ECF No. 148), the public redacted version of
 27 Defendant’s MSJ can be found at ECF No. 160.

28 ³ Citations to docketed materials refer to the CM/ECF page numbers electronically stamped at the top of
 each page. The Court also cites to the public redacted versions of the parties pleadings when possible.

1 “any suggestions, innovations, inventions, or other matters created by an employee on work
 2 time or with company tools or property” were “property of the company.” (Freeman Decl.
 3 Ex. J at 67, ECF No. 212-4 at 25.)

4 Prior to and after founding Plaintiff, Mr. Freeman did significant research in the area
 5 of investment strategies. (FAC ¶ 7, ECF No. 18.) This included “conduct[ing] extensive
 6 calculations, wr[iting] papers, and prepar[ing] charts and graphs that laid out the
 7 advantages of emphasizing volatility as a new investment style, and as a basis for
 8 calculating volatility-based indexes to provide a benchmark for tracking stock
 9 performance.” (*Id.* at ¶ 8.)

10 In fall 2009 Mr. Freeman contacted Defendant, which also provides investment
 11 products and services, to discuss a potential business deal. (*Id.* at ¶¶ 9–10.) Because
 12 Defendant’s representatives assured Plaintiff that Defendant would respect Plaintiff’s
 13 intellectual property (*id.* at ¶ 11) and signed a non-disclosure agreement (*id.* at ¶ 14),
 14 Plaintiff shared the results of its research with Defendant (*id.*). This included a document
 15 titled “Divide and Conquer: A More Efficient Approach to Equity Style” (the White Paper).
 16 (*Id.* at ¶ 17.) The White Paper was written by Mr. Freeman as an employee of Plaintiff and
 17 using an office, computer, and research and data from subscriptions provided by Plaintiff.
 18 (Freeman Decl. ¶ 9, ECF No. 212-2.)

19 After several months spent learning the details of Plaintiff’s research and strategies,
 20 Defendant informed Plaintiff that it would not proceed with the proposed business venture.
 21 (FAC ¶ 29, ECF No. 18.) In early 2011, however, Defendant publicly announced new
 22 indices emphasizing volatility (*id.* at ¶ 31), which adopt Plaintiff’s confidential and trade
 23 secret information (*id.* at ¶ 41).

24 Prior to Defendant’s announcement of its own indices, Christopher Siriani,
 25 Plaintiff’s then-Director of Operations and Chief Compliance Officer (Decl. of Christopher
 26 Siriani (Siriani Decl.) ¶ 1, ECF No. 212-1), filed a Certificate of Cancellation with the
 27 Delaware Secretary of State in December 2010 to dissolve Plaintiff (Decl. of Eric B. Evans
 28 (Evans Decl.) Ex. 30, ECF No. 183-31). Pete Johnson filed a Certificate of Correction on

1 November 26, 2013, which claimed that the Certificate of Cancellation filed by Mr. Siriani
 2 was null and void because it “was filed without consent or approval of the board of
 3 managers.” (Evans Decl. Ex. 34, ECF No. 183-35.)

4 **II. Procedural Background**

5 Plaintiff filed its initial complaint on December 6, 2013, alleging causes of action
 6 for trade secret misappropriation, breach of contract, breach of the implied covenant of
 7 good faith and fair dealing, breach of confidence, fraud, and constructive fraud. (ECF No.
 8 1.) On July 7, 2014, Plaintiff filed its FAC, dropping its cause of action for breach of
 9 confidence. (ECF No. 18.) Defendant answered the FAC on January 16, 2015, raising
 10 affirmative defenses of unclean hands, waiver, and estoppel. (Answer, ECF No. 31.)

11 On January 7, 2016—just prior to the discovery cut-off (*see* ECF No. 75) and after
 12 the deadline to amend the pleadings (*see* ECF No. 41)—Defendant filed the instant Motion
 13 to Amend (ECF No. 86). The Court declined to expedite the hearing and shorten the
 14 briefing schedule as Defendant requested. (*See* ECF Nos. 87, 95.)

15 On February 4, 2016, Defendant asked the Court to modify the scheduling order to
 16 extend, among other things, the discovery cut-off. (*See* ECF No. 125.) While that motion
 17 was pending, the parties filed their MSJs and *Daubert* Motions (*see* ECF Nos. 133, 134,
 18 154, 159, 160) and Defendant filed the instant MTD (*see* ECF No. 173). On April 28,
 19 2016, Magistrate Judge Ruben B. Brooks granted Defendant leave to take an additional
 20 fourteen hours of deposition testimony but otherwise declined to extend any of the
 21 remaining case deadlines. (*See* ECF No. 225.) After the Court vacated the final pretrial
 22 conference on May 16, 2016 (*see* ECF No. 245), Magistrate Judge Brooks vacated all
 23 remaining case management deadlines (*see* ECF No. 246). Defendant has since challenged
 24 Magistrate Judge Brook’s April 28, 2016 order. (*See* ECF No. 253.)

25 **MOTION TO DISMISS**

26 **I. Legal Standard**

27 Federal courts are courts of limited jurisdiction, and as such have an obligation to
 28 dismiss claims for which they lack subject-matter jurisdiction. *Demarest v. United States*,

1 718 F.2d 964, 965 (9th Cir. 1983). Because the issue of standing pertains to the subject
 2 matter jurisdiction of a federal court, motions raising lack of standing are properly brought
 3 under Federal Rule of Civil Procedure 12(b)(1) (“Rule 12(b)(1)”). *White v. Lee*, 227 F.3d
 4 1214, 1242 (9th Cir. 2000). “The party asserting jurisdiction bears the burden of
 5 establishing subject matter jurisdiction on a motion to dismiss for lack of subject matter
 6 jurisdiction.” *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d
 7 981, 984 (9th Cir. 2008) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,
 8 377 (1994); *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d
 9 1221, 1225 (9th Cir. 1989)). “Dismissal for lack of subject matter jurisdiction is
 10 appropriate if the complaint, considered in its entirety, on its face fails to allege facts
 11 sufficient to establish subject matter jurisdiction.” *Id.* (citing *Love v. United States*, 915
 12 F.2d 1242, 1245 (9th Cir. 1990)).

13 Rule 12(b)(1) motions may challenge jurisdiction facially or factually. *Safe Air for
 Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack is one where “the
 15 challenger asserts that the allegations contained in a complaint are insufficient on their face
 to invoke federal jurisdiction.” *Id.* In evaluating such a challenge, the court accepts
 16 the factual allegations in the complaint as true. *See Miranda v. Reno*, 238 F.3d 1156, 1157
 17 n.1 (9th Cir. 2001). In contrast, where the defendant challenges the factual basis underlying
 19 the allegations, the court need not accept the allegations as true and may instead
 20 make factual determinations. *White*, 227 F.3d at 1242. “In ruling on a challenge
 21 to subject matter jurisdiction, the district court is ordinarily free to hear evidence regarding
 22 jurisdiction and to rule on that issue prior to trial, resolving factual disputes where
 23 necessary.” *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing
 24 *Thornhill Publ’g Co. v. Gen. Tel. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)). When making
 25 such a ruling, the district court may review evidence beyond the complaint without
 26 converting the motion to dismiss into a motion for summary judgment. *Savage v. Glendale
 27 Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003) (citing *White*, 227 F.3d at 1242).

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1 **II. Analysis**

2 Defendant first asks the Court to dismiss this case because Plaintiff “had long since
 3 dissolved and no longer existed as a legal entity” at the time Plaintiff filed suit and “its
 4 subsequent efforts in an attempt to revive itself had no legal effect,” preventing this Court
 5 from exercising jurisdiction. (MTD Mem. 6, ECF No. 188; *see also id.* at 14–19.) The
 6 Court concludes, however, that the certification from the Delaware Secretary of State that
 7 Plaintiff “is duly formed under the laws of the State of Delaware and is in good standing
 8 and has a legal existence so far as the records of this office show” (*see* Decl. of Benjamin
 9 J. Everton (Everton Decl.) Ex. S, ECF No. 215 at 37) is dispositive, *see Admin. Servs. of*
 10 *N. Am., Inc. v. Hartford Fid. & Bonding Co.*, No. CIV.A. H-03-3949, 2005 WL 1994277,
 11 at *2 (S.D. Tex. Aug. 16, 2005) (“Because [plaintiff] has provided . . . certification of its
 12 ‘Good Standing’ from the Delaware Secretary of State, the Court is satisfied that [plaintiff]
 13 has the capacity to pursue this lawsuit under Delaware law.”). The Court therefore
 14 **DENIES** Defendant’s MTD to the extent it seeks to dismiss this entire action for lack of
 15 subject-matter jurisdiction.

16 Alternatively, Defendant requests that the Court dismiss Plaintiff’s trade secret
 17 claim, arguing that “the alleged trade secrets belong to [Plaintiff]’s principal, John
 18 Freeman, and not [Plaintiff], so [Plaintiff] lacks standing to bring its trade secret claim.”
 19 (MTD Mem. 6, ECF No. 188; *see also id.* at 20–25.) Although “California courts have not
 20 yet addressed whether ownership of the trade secret is *necessary* to establish standing,”
 21 *Memry Corp. v. Ky. Oil Tech., N.V.*, No. C-04-03843 RMW, 2006 WL 3734384, at *7
 22 (N.D. Cal. Dec. 18, 2006) (citing *State Farm Mut. Auto. Ins. Co. v. Wier*, No. A101791,
 23 2004 WL 2988429, at *12 n.15 (Cal. Ct. App. Dec. 27, 2004) (unpublished)), the Court
 24 concludes that Plaintiff has adequately demonstrated ownership of the trade secrets in
 25 question.

26 Here, Mr. Freeman claims that he “received a copy of the Freeman Employee
 27 Handbook and agreed to its terms when [he] began [his] employment at Freeman.”
 28 (Freeman Decl. ¶ 19, ECF No. 212-2.) The Freeman Employee Handbook expressly

1 provides that “[a]ny and all inventions created, in whole or in part, during an employee’s
 2 work hours, or from the use of the company’s equipment or facilities, is a ‘work for hire’
 3 and the property of the company.” (Freeman Decl. Ex. J at 68, ECF No. 212-4 at 26.) The
 4 same is true of “any suggestions, innovations, inventions, or other matters created by an
 5 employee on work time or with company tools or property.” (Freeman Decl. Ex. J at 67,
 6 ECF No. 212-4 at 25.) Mr. Freeman wrote the White Paper while an employee of Plaintiff,
 7 using an office, computer, and subscription services provided by Plaintiff. (Freeman Decl.
 8 ¶ 9, ECF No. 212-2.)

9 Under the language of the Freeman Employee Handbook, “the contract could not be
 10 more clear in allocating possession of the trade secret information to [Plaintiff].” *State*
 11 *Farm*, 2004 WL 2988429, at *12. Moreover, despite Defendant’s attempt to classify the
 12 handbook as an “agreement to assign” (see MTD Reply 11, ECF No. 237), no further act
 13 was required to transfer title of the trade secrets from Mr. Freeman to Plaintiff, *see, e.g.*,
 14 *Speedplay, Inc. v. Bebop, Inc.*, 211 F.3d 1245, 1253 (Fed. Cir. 2000) (distinguishing
 15 between future and present assignments of patent rights); *Venture Corp. v. Barrett*, No.
 16 5:13-CV-03384-PSG, 2015 WL 8479475, at *4 (N.D. Cal. Dec. 9, 2015) (overturning
 17 jury’s forfeiture finding where “[t]he Inventions Agreement assignment clause uses present
 18 tense language,” meaning that “interest in the three inventions was assigned to [plaintiff]
 19 ‘by operation of law’”); *Dominion Assets LLC v. Masimo Corp.*, No. 12-CV-02773-BLF,
 20 2014 WL 2937058, at *5 (N.D. Cal. June 27, 2014) (“The unambiguous language of the
 21 assignment provision makes assignment automatic”). Accordingly, Plaintiff has
 22 sufficiently demonstrated ownership of the trade secrets and standing to bring its trade
 23 secret cause of action.

24 The Court therefore **DENIES** Defendant’s MTD. (ECF No. 173.)

25 **MOTION TO AMEND**

26 **I. Legal Standard**

27 “After a scheduling order has been issued setting a deadline to amend the pleadings,
 28 and a party moves to amend the pleadings after the deadline, the motion amounts to one to

1 amend the scheduling order and thus is properly brought under Rule 16(b)." *U.S. Bank*
 2 *Nat'l Ass'n v. Wayman*, No. 13-CV-02203-BAS BLM, 2015 WL 5772730, at *5 (S.D. Cal.
 3 Sept. 30, 2015) (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 605, 608 (9th Cir.
 4 1992). "Unlike Rule 15(a)'s liberal amendment policy which focuses on the bad faith of
 5 the party seeking to interpose an amendment and the prejudice to the opposing party, Rule
 6 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the
 7 amendment." *Johnson*, 975 F.2d at 609. As part of this inquiry,

8 the movant may be required to show . . . : (1) that she was diligent
 9 in assisting the Court in creating a workable Rule 16 order . . . ;
 10 (2) that her noncompliance with a Rule 16 deadline occurred or
 11 will occur, notwithstanding her diligent efforts to comply,
 12 because of the development of matters which could not have
 13 been reasonably foreseen or anticipated at the time of the Rule
 14 16 scheduling conference . . . ; and (3) that she was diligent in
 15 seeking amendment of the Rule 16 order, once it became
 16 apparent that she could not comply with the order

17 *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 608 (E.D. Cal. 1999) (citations omitted).
 18 "Although the existence or degree of prejudice to the party opposing the modification
 19 might supply additional reasons to deny a motion, the focus of the inquiry is upon the
 20 moving party's reasons for seeking modification." *Johnson*, 975 F.2d at 609 (citing
Gestetner Corp. v. Case Equip. Co., 108 F.R.D. 138, 141 (D. Me. 1985)). "If th[e moving]
 21 party was not diligent, the inquiry should end." *Id.*

22 If, however, the moving party shows good cause, the party must then demonstrate
 23 that amendment is proper under Rule 15(a). *Id.* at 608 (quoting *Forstmann v. Culp*, 114
 24 F.R.D. 83, 85 (M.D.N.C. 1987)). Under Rule 15(a), leave to amend is generally granted
 25 unless the court harbors concerns "such as undue delay, bad faith or dilatory motive on the
 26 part of the movant, repeated failure to cure deficiencies by amendments previously
 27 allowed, undue prejudice to the opposing party by virtue of allowance of the amendment,
 28 futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

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1 **II. Analysis**

2 Defendant seeks to amend its answer under Rule 15(a) to “supplement[] its existing
 3 affirmative defense of unclean hands and add[] an affirmative defense of setoff based on
 4 . . . newly-discovered information.” (Mot. to Amend Mem. 2, ECF No. 86-1.) Specifically,
 5 Defendant’s original unclean hands affirmative defense was based on Plaintiff’s allegedly
 6 improper incorporation of Barra, LLC’s confidential information into the White Paper.
 7 (See Answer 13, ECF No. 31.) Defendant’s proposed amendment claims that Plaintiff
 8 “also improperly relied on and incorporated [Defendant]’s proprietary information in
 9 violation of [Plaintiff]’s licensing agreements with [Defendant].” (Mot. to Amend Mem.
 10 3, ECF No. 86-1.) Defendant also claims that “[Plaintiff]’s breach of its contractual
 11 obligations with respect to [Defendant]’s proprietary float weights also gives rise to an
 12 additional affirmative defense of setoff.” (*Id.* at 7.)

13 Although the parties’ briefing addresses the Rule 15(a) factors (*see* Mot. to Amend
 14 Mem. 8–11, ECF No. 86-1; Amend Opp’n 7–15, ECF No. 97; Amend Reply 2–11, ECF
 15 No. 156), Magistrate Judge Brook’s scheduling order provided that “[a]ny motion . . . to
 16 amend the pleadings . . . shall be filed and heard on or before October 5, 2015” (ECF No.
 17 41 at 3 (emphasis in original)). This deadline was not affected by any subsequent
 18 modifications. (See ECF Nos. 66, 75.) Because Defendant did not file the instant Motion
 19 to Amend until January 7, 2016, the motion is properly analyzed under Rule 16(b) rather
 20 than Rule 15(a). *See Johnson*, 975 F.2d at 607–08. Accordingly, the controlling inquiry
 21 is Defendant’s diligence in seeking the proposed amendments. *Id.* at 609.

22 Upon consideration of the relevant factors, the Court concludes that Defendant has
 23 failed to establish the requisite good cause. Importantly, Defendant “has failed to move to
 24 amend the scheduling order.” *See Wayman*, 2015 WL 5772730, at *9. “A court may deny
 25 as untimely a motion for leave to amend after a scheduling order deadline has passed,
 26 simply because the party seeking an extension of time did not request a modification of the
 27 scheduling order as well.” *Id.* at *9 n.7 (citing *Johnson*, 975 F.2d at 608). Additionally,
 28 “the Court highlights that [Defendant] filed this motion well after the scheduled deadline

1 to amend the pleadings and one month before the discovery cut-off date.” *See id.* at *9.
 2 Finally, despite claiming to have been first put “on notice” of the facts underlying the
 3 proposed amendments on November 19 or 20, 2015 (*see* Amend Reply 6, ECF No. 156
 4 (citing Supplemental Decl. of Eric B. Evans (Supp. Evans Decl.) ¶ 7, ECF No. 156-1)),
 5 Defendant neither included a request to modify the already-expired deadline to amend in
 6 its December 3, 2015 joint motion (*see* ECF No. 72) nor mentioned its intention to seek
 7 leave to amend at any of the multiple proceedings held before Magistrate Judge Brooks in
 8 December 2015 (*see* ECF Nos. 76, 78, 80, 84). Such “carelessness is not compatible with
 9 a finding of diligence” *See Johnson*, 975 F.2d at 609 (collecting cases).

10 While the inquiry should end there, *see id.*, even if the Court were to address the
 11 Rule 15(a) factors, the Court’s conclusion would not change. Plaintiff has carried its
 12 burden of demonstrating that the proposed amendments are not warranted. *See, e.g.*,
 13 *Wizards of the Coast LLC v. Cryptozoic Entm’t LLC*, No. C14-0719JLR, 2015 WL
 14 4641714, at *3 (W.D. Wash. Aug. 4, 2015) (“[T]he party opposing amendment has the
 15 burden of showing that amendment is not warranted.”) (citing *DCD Programs, Ltd. v.*
 16 *Leighton*, 833 F.2d 183, 187 (9th Cir. 1987); *Richardson v. United States*, 841 F.2d 993,
 17 999 (9th Cir. 1988)); *Angel Jet Servs., L.L.C. v. Raytheon Health Benefits Plan*, No. 2:10-
 18 CV-01385-PHX, 2011 WL 744917, at *2 (D. Ariz. Feb. 25, 2011) (“[T]he party opposing
 19 amendment bears the burden of showing prejudice, futility, or one of the other permissible
 20 reasons for denying a motion to amend.”) (quoting *DCD Programs*, 833 F.2d at 187).

21 First, Plaintiff argues that Defendant unduly delayed in filing its Motion to Amend
 22 because Defendant had learned of all the relevant facts at least six months before filing its
 23 original Answer. (*See* Amend Opp’n 8–11, ECF No. 97.) Specifically, Plaintiff argues
 24 that the document Defendant cites to support its allegation that Plaintiff used Defendant’s
 25 float weights in the White Paper is an email dated January 14, 2010 from Mr. Freeman to
 26 an employee of Defendant, meaning that “five years before [Defendant] filed its Answer,
 27 [Defendant] possessed the information necessary to form the allegation that [Plaintiff] used
 28 [Defendant]’s float weights.” (*Id.* at 9.) Defendant counters that “[the employee]’s receipt

1 of the Float Weights Email in 2010 does not establish *Russell*'s knowledge of the facts
 2 reflected in that email." (Amend Reply 4–5, ECF No. 156.) Instead, Defendant argues, it
 3 was not put on notice that Plaintiff may have improperly used Defendant's confidential
 4 information until late November 2015, at the employee's pre-deposition meeting and
 5 deposition. (*Id.* at 6.)

6 As discussed above, Defendant was not as diligent as it attempts to portray itself.
 7 Moreover, Defendant itself produced the relevant email to Plaintiff on August 20, 2015
 8 (*see* Everton Decl. ¶ 5, ECF No. 97-1), three months before Defendant claims to have been
 9 put on notice and nearly five months before filing the instant motion. It therefore seems
 10 likely that Defendant was "on notice" earlier than it asserts. Even assuming, however, that
 11 Defendant did not learn of the facts relevant to its proposed amendments until late
 12 November 2015, Defendant has offered no explanation for its delay in filing the instant
 13 motion, particularly in light of the then-imminent discovery cut-off. Defendant's undue
 14 delay in seeking amendment weighs against granting the instant motion. *See, e.g.*,
 15 *Demoura v. Ford*, No. 1:09-CV-01344-LJO, 2012 WL 1898905, at *10 (E.D. Cal. May 23,
 16 2012) (denying motion to amend where "Plaintiffs waited nearly two months . . . to request
 17 amendment" and "failed to explain why they delayed in seeking amendment").

18 Second, Plaintiff claims that it will be unduly prejudiced by the amendments
 19 Defendant seeks, which greatly change the parties' positions in the litigation, require
 20 additional discovery thereby delaying the proceedings, and are made after many key
 21 witnesses have been deposed. (*See generally* Amend Opp'n 11–15, ECF No. 97.) These
 22 arguments are not without merit. While it is true that Defendant previously asserted an
 23 unclean hands defense (*see* Amend Reply 8, ECF No. 156), the proposed amendment—
 24 which adds new allegations concerning Plaintiff's allegedly improper incorporation of
 25 Defendant's rather than a third party's confidential information—will require additional
 26 discovery (*see* Mot. to Amend Mem. 11, ECF No. 86-1). Because Defendant filed the
 27 Motion to Amend so close to the discovery cut-off—which has since expired—Plaintiff
 28 does not have "ample time to conduct additional discovery." (*See* Amend Reply 9–10,

1 ECF No. 156 (emphasis omitted).) Additionally, the parties would likely need to rebrief
2 Plaintiff's MSJ, which seeks summary adjudication of Defendant's affirmative defenses
3 (see Pl.'s MSJ, ECF No. 133), if the Court were to grant the instant motion.

4 While the Court is mindful of its interest in providing
5 [Defendant] with an opportunity to fully litigate any [affirmative
6 defenses it] may have against [Plaintiff], the prejudice to
7 [Plaintiff] that would result from allowing [Defendant] to
8 overhaul [its affirmative defenses] at the conclusion of the
discovery period and after [the parties] have moved for summary
judgment is sufficient to deny leave under Rule 15.

9 *Quan v. San Francisco Police Dep't*, No. C 10-01835 MEJ, 2011 WL 2470477, at *6 (N.D.
10 Cal. June 21, 2011) (citing *Foman*, 371 U.S. at 182).

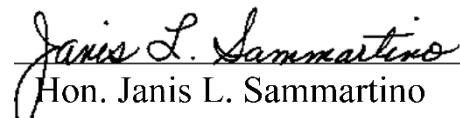
11 Because Defendant has failed to show good cause under Rule 16(b) or that
12 amendment is proper under Rule 15(a), the Court **DENIES** Defendant's Motion to Amend.
13 (ECF No. 86.)

14 CONCLUSION

15 In light of the foregoing, the Court **DENIES** Defendant's MTD (ECF No. 173),
16 **DENIES** Defendant's Motion to Amend (ECF No. 86), and **SETS A HEARING** on the
17 parties' MSJs (ECF Nos. 133, 134, 160) and *Daubert* Motions (ECF Nos. 154, 159) for
18 August 18, 2016 at 1:30 p.m. in Courtroom 4A.

19 **IT IS SO ORDERED.**

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21 Dated: July 18, 2016


22 Hon. Janis L. Sammartino
23 United States District Judge
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